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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re KYLE E.,

on Habeas Corpus.

G034940

(Super. Ct. No. DL017559)

O P I N I O N

Original proceedings; petition for a writ of habeas corpus to file a late notice of appeal. Petition granted.

Patrick E. DuNah for Petitioner.

No appearance for Respondent Court.

Bill Lockyer, Attorney General, and Robert M. Foster, Deputy Attorney General, for Respondent.

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THE COURT:\*

Kyle E. (minor) seeks relief from the failure to file a timely notice of appeal. The petition is granted.

After the juvenile court denied minor's motion to suppress evidence, he admitted being in possession of marijuana and a dirk or dagger on school grounds. (Health & Saf. Code, § 11357 subd. (e) and Pen. Code, § 626.10, subd. (a).) As a result, on July 1, 2004, minor was declared a ward of the juvenile court and granted probation. According to trial counsel, on this same day, he advised minor that he had sixty days to file a notice of appeal. Four days before the sixty days was scheduled to expire, counsel called and spoke to minor's mother on August 26, and advised her that if minor wanted to file a notice of appeal, he needed to contact his office no later than the morning of August 30. On August 30, minor called counsel's office at around 3:00 p.m. stating he wanted to appeal. Unfortunately, counsel was in trial and did not receive the message until "after hours." Counsel prepared the notice of appeal and it was filed September 1, 2004.

The superior court stamped the notice of appeal "received" but did not file the notice because it was beyond the sixty-day time limit to file a notice of appeal. (Cal. Rules of Court, rule 31.)

The Attorney General does not oppose minor's request for relief to file the notice of appeal. (*People v. Romero* (1994) 8 Cal.4th 728, 739-740, fn. 7.)

The principle of constructive filing of the notice of appeal should be applied in situations where a criminal defendant requests trial counsel to file a notice of appeal on his behalf and counsel fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) This is because a trial attorney who has been asked to file a notice of appeal on behalf of a client has a duty to file a proper notice of appeal, or tell the client how to file it himself. In this case, counsel advised minor that if he called his

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\* Before Sills, P.J., Aronson, J., and Ikola, J.

office on August 30, he would file a notice of appeal on his behalf, and he did not. minor's reliance on counsel's promise to file a notice of appeal entitles him to the relief requested.

The petition is granted. The Clerk of the Superior Court is directed to file the notice of appeal that was received but not filed on September 1, 2004. Further proceedings, including the preparation of the record on appeal, are to be conducted according to the applicable rules of court. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith.